STATE OF MICHIGAN

COURT OF APPEALS

KYLE SCHEUNEMAN and LINDY SCHEUNEMAN,

Plaintiffs-Appellants,

v

KENT POWER INC.,

Defendant-Appellee.

UNPUBLISHED
May 16, 2019

No. 344109
Kent Circuit Court
LC No. 17-009761-NO

Before: GLEICHER, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Plaintiffs Kyle and Lindy Scheuneman appeal as of right the trial court's order granting defendant Kent Power, Inc.'s, motion for summary disposition pursuant to MCR 2.116(C)(8). This matter arises out of injuries Kyle sustained during the course of his employment by defendant. Plaintiffs asserted an intentional tort claim under the Worker's Disability Compensation Act of 1969 (the WDCA), MCL 418.101 *et seq*., generally alleging that defendant intentionally failed to provide plaintiff with proper safety equipment and training, and it knew that Kyle would be injured as a consequence. The trial court initially agreed with defendant that plaintiffs' complaint was too conclusory, but permitted plaintiffs to amend. The trial court found the amended complaint still too conclusory and granted summary disposition. We express no opinion as to the original complaint, but we conclude that the amended complaint adequately alleged an intentional tort under the WDCA. Therefore, we reverse and remand.

I. BACKGROUND

On April 23, 2015, defendant assigned Kyle to transfer live electrical power lines from an old wooden pole to a new wooden pole. Kyle completed the work from an elevated aerial lift. Dan Kucinskas, Kyle's supervisor, was present at the work site to observe and inspect Kyle's work. Kucinskas eventually left the work site while Kyle was completing the project. After Kucinskas left the work site, as defendant succinctly describes, Kyle "contacted the energized electrical distribution line, and he was electrified." Kyle suffered a multitude of severe and permanent injuries.

Plaintiffs filed this intentional tort claim under the exception to the exclusive remedy provision pursuant to the WDCA. In particular, plaintiffs alleged that defendant intentionally failed to provide plaintiff with the necessary safety training and equipment, Kucinskas knew that plaintiff would be injured without that safety training and equipment, and Kucinskas left the worksite without informing plaintiff that plaintiff was performing the work improperly or needed additional safety equipment, in intentional disregard of the certainty that plaintiff would be injured. Plaintiffs also alleged that defendant had a history of similar electrical safety violations that had also caused injuries or death to defendant's employees. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), largely on the argument that plaintiffs' use of the word "intentional" was conclusory; and plaintiffs had not actually alleged any facts from which either actual knowledge, willful disregard, or an intent to cause harm could be inferred. The trial court agreed with defendant that plaintiffs' complaint failed to set forth any facts sufficient to support plaintiffs' conclusion that defendant acted with the requisite knowledge or intent. However, the trial court denied defendant's motion in order to afford plaintiffs the opportunity to amend their complaint.

Plaintiffs' amended complaint added a number of statements to the effect that defendant or Kucinskas had actual knowledge of the dangers Kyle faced in performing the work, of the lack of safety training and equipment, and of the certainty that Kyle would be injured in the absence of that safety training and equipment. Among other matters, plaintiffs alleged that the work Kyle had been ordered to perform required specific safety equipment and training, none of which had been provided, and the absence of which guaranteed an injury. Plaintiffs also alleged that defendant and Kucinskas were aware that injury would occur in the absence of the equipment and training, noting that defendant had a history of injuring or killing employees by violating safety precautions. Defendant again moved for summary disposition pursuant to MCR 2.116(C)(8), again largely arguing that plaintiff had alleged conclusions rather than facts supporting those conclusions. The trial court again agreed that several of plaintiffs' critical allegations were unsupported by facts; for example, plaintiffs had not provided any facts in support of the allegation that Kucinskas had actual knowledge that plaintiff was certain to be injured. It concluded that plaintiffs had not alleged facts from which a certainty of injury could be inferred or from which any willful disregard of that certainty had occurred. Therefore, the trial court granted defendant's motion for summary disposition. Plaintiff now appeals.

II. STANDARD OF REVIEW

"This Court reviews de novo the grant or denial of a motion for summary disposition." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "In making this determination, this Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition may be granted when "the opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, 461 Mich at 119. Summary disposition is properly granted when the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*.

"A complaint must provide reasonable notice to opposing parties," and it is insufficient to allege mere conclusions without also alleging a factual basis for those conclusions. *Dacon v Transue*, 441 Mich 315, 329-330; 490 NW2d 369 (1992); see also *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014); *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). Thus, it is insufficient simply to recite the presence of the elements of a particular claim. See *Kloian v Schwartz*, 272 Mich App 232, 240-241; 725 NW2d 671 (2006). "[A] plaintiff must be able to allege a specific danger known to the employer that was certain to result in an injury and must allege that the employer required the plaintiff to work in the face of the danger." *Smith v Mirror Lite Co*, 196 Mich App 190, 192-193; 492 NW2d 744 (1992). However, it may be difficult to identify the boundary between a proper allegation of fact and an improper conclusory statement, but if there is doubt, the courts should err on the side of generosity. *Flynn v Brownell*, 371 Mich 19, 26-27; 123 NW2d 153 (1963). Public policy in Michigan has long favored resolving cases on their merits if reasonably possible. See *Dailey v Kennedy*, 64 Mich 208, 214; 31 NW 125 (1887); *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986).

III. INTENTIONAL TORT EXCEPTION

Generally, an employee's exclusive remedies for work-related injuries or occupational disease are the remedies permitted under the WDCA. However, the exclusive remedy provision of the WDCA permits an employee to pursue an intentional tort claim. MCL 418.131(1). MCL 418.131(1) provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

In order to recover under the intentional tort exception of the WDCA, a plaintiff must prove (1) that his or her employer deliberately acted or failed to act (2) with the purpose of inflicting injury upon the employee. MCL 418.131(1); *Travis v Dreis and Krump Mfg Co*, 453 Mich 149, 169-172, 172; 551 NW2d 132 (1996). An employer's intent to injure can be proved by circumstantial evidence. *Id*. at 173. Intent to injure can be inferred "if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Id*. at 180. An employer's act or omission "must be more than mere negligence." *Id*. at 178-179.

A plaintiff may not allege that an employer merely should have known that injury was certain to occur, and may not rely on constructive, implied, or imputed knowledge. *Id*. at 173. However, actual knowledge held by a supervisory or managerial employee may be imputed to the employer. *Id*. at 173-174. "An injury certain to occur" is one in that "no doubt exists with

regard to whether it will occur." *Id*. at 174. A certain injury "cannot be established by reliance on the laws of probability, the mere occurrence of a similar event, or conclusory statements of experts." *Alexander v Demmer Corp*, 468 Mich 896, 896; 660 NW2d 67 (2003). "A continuously operative dangerous condition may form the basis of a claim under the intentional tort exception only if the employer *knows* the condition will cause an injury and refrains from informing the employee about it." *Id*. (emphasis in original).

IV. ANALYSIS

It is clear from the face of plaintiffs' amended complaint that they alleged the presence of all elements of a tort claim in satisfaction of the exception to the WDCA. Plaintiffs asserted that, for example, defendant actually knew that Kyle would certainly be injured in the absence of safety equipment and training that defendant knew had not been provided to Kyle. Plaintiffs similarly asserted that Kucinskas also actually knew that Kyle was performing the work without adequate safety equipment or procedures, that Kyle would certainly be injured as a result, and that Kucinskas willfully disregarded that certainty of harm by leaving the site instead of acting to ensure Kyle's safety. These allegations facially state an unambiguous claim in satisfaction of the intentional tort exception to the WDCA. The issue, however, is whether plaintiffs' complaint is "well-pleaded" and thus adequately states a factual basis for those allegations.

As discussed, when considering a motion for summary disposition pursuant to MCR 2.116(C)(8), "[a]ll *factual* allegations supporting the claim are accepted as true," but "the mere statement of a pleader's conclusions, unsupported by allegations *of fact*, will not suffice to state a cause of action." *ETT Ambulance Service Corp*, 204 Mich App at 395. However, as also discussed, if there is any doubt whether an allegation sets forth a fact or a conclusion, the courts will avoid chasing a metaphysical rabbit-hole. *Flynn*, 371 Mich at 26-27. The "intentional tort" exception to the WDCA is not a traditional intentional tort. *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014). The facts that must be alleged are exacting. See *Gray v Morley*, 460 Mich 738, 742-743; 596 NW2d 922 (1999). However, we find no authority suggesting that an intentional tort under the WDCA requires any special standard of *pleading*.

It would be inappropriate at the complaint stage to require any litigant to have such command of the evidence that discovery would be unnecessary. Even in a fraud claim where there actually *is* a heightened standard of pleading, the complaint must be read as a whole to determine whether the allegations are sufficient. See *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 443; 491 NW2d 545 (1992), overruled on other grounds by *Haynes v Neshewat*, 477 Mich 29, 38-39; 729 NW2d 488 (2007). Furthermore, an employer whose business involves working with certain substances is expected to comprehend the basic physical laws and scientific principles governing those substances, as well as the common dangers and consequences that naturally follow. *Adams v Grand Rapids Refrigerator Co*, 160 Mich 590, 593-595; 125 NW 724 (1910). A plaintiff alleging a WDCA intentional tort does *not* need to allege that the defendant knew precisely *when* an injury would occur, only that the injury was inevitable. *Johnson v Detroit Edison Co*, 288 Mich App 688, 699; 795 NW2d 161 (2010). The fact that the employee may also be aware of the same physical laws and dangers does not preclude a WDCA intentional tort. *Id*. at 703. Tort jurisprudence simply presumes a certain amount of awareness of reality. See Oliver Wendell Holmes, Jr., *The Common Law*, 146-163 (1881).

It is the most fundamental fact of working with electricity that electricity always "takes the shortest path to ground." This is such an obvious and well-known physical law that defendant cannot possibly be unaware of its existence, applicability, and ramifications; we cannot hold that plaintiffs were required to set it forth specifically in their complaint. Read as a whole, it is clear from the complaint that Kyle was ordered to perform work that entailed physically manipulating live power lines in some way. It is an indisputable fact that *if* Kyle were to become "the shortest path to ground," for whatever reason, he would be electrocuted. The complaint adequately alleges that such an event *would* occur in the absence of proper safety precautions. The complaint further adequately alleges that no such safety precautions were taken, and that defendant was aware no such safety precautions were taken. There is no cognitive leap in concluding that Kyle's injury was, as a consequence, inevitable, and that defendant actually knew that the injury was inevitable. As noted, plaintiffs need not allege that defendant actually knew that Kyle's injury would occur exactly when it occurred.

We conclude that the amended complaint sets forth allegations of fact that, if ultimately supported by admissible evidence, establish that defendant actually knew that Kyle would inevitably be injured as a consequence of defendant's willful disregard of safety precautions, and that Kyle was actually injured because of that disregard. The allegations here go beyond merely establishing a high likelihood of injury. We note that defendant's argument essentially asserts a nonexistent heightened standard for pleading. We are also unimpressed with defendant's implied "opening the floodgates" argument if the instant claim is allowed to proceed without more detailed factual allegations. We recognize that a WDCA intentional tort is supposed to be exceptional, but we decline to make it impossible. In the event a complaint proves to be a complete work of fiction for the sole purpose of engaging in a fishing expedition, sanctions remain available under MCR 1.109(E).

V. CONCLUSION

We conclude that the trial court improperly found plaintiffs' allegations in their amended complaint too conclusory and insufficiently factual to state a claim under the intentional tort exception of the WDCA. The trial court therefore erred in granting summary disposition pursuant to MCR 2.116(C)(8). We reiterate that we express no opinion regarding the original complaint.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Plaintiffs, being the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien